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United States Court of Appeals
For the
District of Columbia Circuit
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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

COMPLAINT

(Filed July 15, 1953)

In the United States District Court for the District of Columbia

Civil Action No. 3221–53

LINDA A. MATTEO, 3833 NORTH NINTH STREET, ARLINGTON, VA. AND JOHN J. MADIGAN, 12710 TWO-FARM-DRIVE, SILVER SPRING, MD., PLAINTIFFS

vs

WILLIAM G. BARR, MIDWAY HALL, 24TH AND OKLAHOMA AVENUE N. E., WASHINGTON, D. C., OR 3519 NORTH EDISON STREET, ARLINGTON, VA., DEFENDANT

COMPLAINT FOR LIBEL

Complaint of Linda A. Matteo and John J. Madigan, through their attorney, Byron N. Scott, respectively shows to the Court as follows:

COUNT I

1. Jurisdiction of this Court is based on Title II, Section 306, of the District of Columbia Code (1951 Edition) and the fact that the amount involved exceeds Three Thousand Dollars ($3,000) exclusive of costs.

2. Plaintiff Linda A. Matteo was, during the time hereinafter mentioned, Director of Personnel Branch of the Office of Rent Stabilization, and had been a Civil Service employee for thirteen years, and Plaintiff John J. Madigan was, during the time hereinafter mentioned, Deputy Director, Administration, of the Office of Rent Stabilization, and had been a Civil Service employee for forty-two years, and both were and always had been persons of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of their coworkers and superiors, and neighbors and other worthy citizens of the District of Columbia and of the United States, and until the commission of the grievances hereinafter set forth, were not suspected of conduct or practices in any manner inimical to the best interests of the United States or its Government, or of "bilking," "defrauding" or "conspiring to defraud" the United States or of participating in any "unjustifiable raid on the United States Treasury" or of violating any law or the "spirit" of any law.

3. The defendant, William G. Barr, during the time hereinafter mentioned was Deputy Director of the Office of Rent Stabilization for the United States.

4. The defendant is sued for damaging and injuring the plaintiffs through the process of libel as hereinafter more fully will appear and because the defendant, in the hope of furthering his own political fortunes, falsely, maliciously and in reckless or careless indifference to the rights and feelings of the plaintiffs, composed, wrote, published, circulated, distributed

and caused to be composed, written, published, circulated and distributed, the libel hereinafter set forth.

5. On the 5th day of February 1953, newspapers of general circulation in the District of Columbia and elsewhere carried news articles under various headlines such as: "U. S. Bilked 'Millions' by Leave Trick," which contained, inter alia, the following words and statements: "Sen. John J. Williams (R. Del.) who exposed the Internal Revenue Bureau scandals, said the 'highly questionable' maneuver, now discontinued (meaning various terminal leave payments made in 1950 to 49 employees of the Office of Rent Stabilization), was an 'unjustifiable raid' on the Treasury"; "Sen. Williams charged in a Senate speech that some government agencies used the fire-and-rehire technique to enable employees to collect cash for unused annual leave even tho they were not really entitled to it"; "Sen. Williams listed the Office of Rent Stabilization as one offender"; "Sen. Homer Ferguson (R. Mich.) noted that Edwin D. Dupree, Jr., listed by Sen. Williams as General Counsel of the rent office, received a leave payment of $3,654, and was rehired the next day. It is 'apparent' Sen. Ferguson said, that Dupree was 'in the conspiracy to defraud the government'; Sen. Williams (R.) of Delaware charged in the Senate yesterday that federal employees profited from an 'unjustifiable raid' on the United States Treasury authorized by their agencies, using 'highly questionable' leave practices which may cost millions"; "The Senator said that in the rent agency alone 49 employees had received $88,266 in terminal leave payments"; "Williams said he felt an investigation should be made by the Senate Appropriations Committee and the Government Operations Committee to 'examine the extent to which this questionable procedure, had been followed and, if the laws have been violated, appropriate steps should be taken' "; "Officials of the rent agency have confirmed that the practice was followed in that bureau, Williams said, adding that 'to say the least it is an unjustifiable raid on the federal treasury, and the heads of every agency in the government who have condoned this practice should be called to task' "; "The Attorney General, a Senate investigating committee and the General Accounting Office were expected today to get on the

trail of a vacation pay practice described by Senator Williams, Republican, of Delaware as a raid on the Treasury by many Government Agencies"; "Senator Williams estimated that the 'questionable practice' may have cost the government millions of dollars'."

6. The matters alleged in paragraph 5 herein were widely circulated and had the tendency and did cause the readers of these papers to believe that various people had engaged in a plan to "bilk" the United States of millions of dollars by a "leave trick" or "highly questionable maneuver" to "collect cash for unused leave even though they were not really entitled to it" and had engaged in "a conspiracy to defraud the Government."

7. The defendant, well knowing the premises, but maliciously contriving and intending to benefit himself and to injure the plaintiffs and to deprive them of the respect, confidence and esteem peculiarly essential to plaintiffs' professions, and maliciously contriving and intending to injure the plaintiffs in their good names, reputations, and the esteem of their co-workers and neighbors, and to bring them into public scandal, ridicule and professional disrepute before their co-workers, neighbors, government workers, friends, acquaintances and residents of the District of Columbia and of the United States, and to hold the plaintiffs up to public scorn, contempt, ridicule and disgrace, and to injure them in pursuit of their livelihood, and to benefit the defendant politically, and to cause it to be suspected and believed that the plaintiffs as Government Employees, in the conduct of their offices, had been guilty of "bilking," "defrauding" and "conspiring to defraud" the United States and of being "responsible" for and "participating in" an "unjustifiable raid on the United States Treasury," and violating the spirit of a Federal Statute, did heretofore, to wit, on or about the 5th day of February 1953, falsely, wrongfully, knowingly, wilfully and maliciously publish and circulate and cause to be published and widely circulated among newspapers and others in the District of Columbia and elsewhere for the purpose and with the intention of having the same published of and concerning the plaintiffs, in a writing denominated "Special Release, Office of Rent Stabilization, Washington,

D. C.," the following false, scandalous and defamatory libel, that is to say:

Special release — For immediate release, February 5, 1953

OFFICE OF RENT STABILIZATION
Washington, D. C.

William G. Barr, Acting Director of Rent Stabilization today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.

Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953, and the suspension of these employees will be his first act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

"In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator

Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

8. The foregoing referred specifically to plaintiffs by their respective names, charged them with having violated the law, and was meant and intended to convey that plaintiffs were "responsible" for a plan which had "bilked" the United States of "millions" by "trick leave", in a "highly questionable maneuver," by an "unjustifiable raid on the Treasury" which had enabled the plaintiffs to "collect cash for unused annual leave even tho they were not really entitled to it"; that they were "offenders" against the Government of the United States, and that they had engaged in a "conspiracy to defraud the Government"; and did by insinuation and innuendo charge the plaintiffs with dealing dishonestly with the Government or with being guilty of some crime, and was meant and intended to hold the plaintiffs in contempt in the eyes of the people of the District of Columbia and elsewhere.

9. On February 6, 1953, defendant composed and dispatched and caused to be composed and dispatched over the teletype to individuals in Boston, Massachusetts, Cleveland, Ohio, Dallas, Texas, Philadelphia, Pennsylvania, Atlanta, Georgia, Chicago, Illinois and San Francisco, California, the following writing, to wit:

> Watch for Barr story wired you yesterday. Advise us how you handled. Please rush all clippings this subject without delay.

meaning the "News Release" set forth in paragraph 7 herein and intending thereby to secure the widest possible circulation of the said release and to hold the plaintiffs up to public scorn, contempt, ridicule and disgrace before as many people as possible.

* * * * *

(Signed) BYRON N. SCOTT.

Motion to Dismiss

(Filed August 4, 1953)

Comes now the defendant by his attorney, the United States Attorney, of the District of Columbia, and moves this Court to dismiss the complaint on the grounds that the complainant fails to state a claim on which relief can be granted and on the further grounds that this is a suit against the United States without its consent.

* * * * * *

Memorandum to the Clerk

(Filed September 2, 1953)

The motion of the Defendant to dismiss the complaint is overruled on the authority of Colpoys v. Gates, 73 App. D. C. 193, 118 F. 2d 16 (1941).

Order is entered herewith.

(Signed) Charles F. McLaughlin,
Judge.

* * * * *

Order

(Filed September 2, 1953)

The above-entitled cause having come on for oral hearing before the Court on the motion of the Defendant to dismiss the complaint filed herein, and the Court having fully considered the complaint and the argument had therein and the written memoranda and points and authorities filed by Plaintiff and Defendant, respectively, in support of, and in opposition to, the said motion, and the Court being fully advised in the premises, it is this 2nd day of September 1953,

Ordered, that the said motion of the Defendant be and the same is hereby overruled.

(Signed) Charles F. McLaughlin,
Judge.

* * * * *

Answer

(Filed September 15, 1953)

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The alleged libel is a statement of the truth about the defendant and the facts to which it relates.

THIRD DEFENSE

The alleged libel was in the realm of fair comment, being a statement to the press concerning facts within defendant's knowledge.

FOURTH DEFENSE

Plaintiffs have not suffered any damage as a result of the alleged libel.

FIFTH DEFENSE

The statement by defendant here complained of is not libelous since it imputes no illegal action or professional incompetence to plaintiffs, but merely disapproval of plaintiffs' acts.

SIXTH DEFENSE

Answering the numbered paragraphs of the complaint, defendant avers:

1. Defendant need not answer paragraph 1 as it states a conclusion of law.

2. Defendant admits the allegations as to plaintiffs' respective positions of employment but is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

3. Admitted.

4. Defendant admits the nature of the suit as alleged in this paragraph but denies the remaining allegations contained herein.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the complaint.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the complaint but avers that if the facts alleged therein be true, this action does not lie since the alleged damage, if any, to plaintiffs arose from statements by others than defendant herein.

7. Defendant denies paragraph 7 of the complaint except that he admits that he issued the quoted press release with the intention that it be circulated and published.

8. Defendant admits that the press release quoted in paragraph 7 of the complaint referred specifically to plaintiffs by their respective names. Defendant denies the remaining allegations in this paragraph of the complaint and feels obliged to point out that the press release specifically renounced an implication of illegal action by plaintiffs.

9. Defendant admits the allegations of this paragraph of the complaint except that he denies the alleged intention on his part beyond the intention to secure the widest possible circulation of the press release complained of herein.

10. Denied.

Wherefore, having fully answered each and every allegation of the complaint, defendant demands judgment in his favor together with the costs of this action.

* * * * *

Amendment to Complaint

(Filed October 10, 1955)

Come now the plaintiffs and with the consent of counsel for the defendant hereby amend their complaint in the following respects:

(a) By striking paragraph 10 of the complaint and substituting in lieu thereof the following:

> As a result of the libelous words published by the defendant as aforesaid, plaintiffs have been greviously injured in their good names and reputations and in their professions or businesses; they have undergone great pain and suffering of body and mind, and they have suffered substantial losses of earnings.

(b) By striking the ad damnum clause of the complaint and substituting in lieu thereof the following:

> Wherefore, the plaintiff, Linda A. Matteo, demands judgment for compensatory damages in the sum of $150,000 and punitive damages in the sum of $100,000, besides costs; and the plaintiff, John J. Madigan, demands judgment for compensatory damages in the sum of $150,000 and for punitive damages in the sum of $100,000, besides costs.

* * * * *

Pretrial Proceedings

(Filed October 11, 1955)

STATEMENT OF NATURE OF CASE

The pretrial statements of plaintiffs and defendant, attached hereto, are adopted.

Plaintiffs are hereby granted leave to amend their complaint and defendant is hereby granted leave to amend his answer.

Defendant is hereby granted leave to file a motion for summary judgment provided that said motion shall be filed within such time as not to delay the trial of this action in the event said motion is denied.

Plaintiffs are hereby granted leave to take the deposition of the defendant at a time to be fixed by counsel.

It is stipulated that a copy of the press release complained of, dated February 5, 1953, and initialed by the counsel, may be received in evidence.

Edward M. Curran,
Pretrial Judge.

* * * * *

Pretrial Statement of the Plaintiffs

This is an action for libel. The words complained of were contained in a press release issued by the defendant on February 5, 1953, which is recited verbatim in paragraph 7 of the complaint and incorporated herein by reference.

At the time of the publication of the libel, plaintiff Madigan was Deputy Director for Administration, plaintiff Matteo was Director of Personnel, and defendant Barr was Deputy Director, respectively, of the Office of Rent Stabilization, a United States Government Agency.

The said press release was issued coincident with stories widely circulated and reported in various newspapers, including those in the District of Columbia, to the effect that the plan mentioned in the press release, in connection with which the defendant had identified the plaintiffs, (a) constituted a trick which had bilked the United States of millions, (b) was an unjustifiable raid on the United States Treasury, (c) enabled employees to collect cash for annual leave to which they were not entitled, (d) was a conspiracy to defraud the Government, and (e) otherwise that it was a highly questionable practice.

Plaintiffs claim:

1. That the press release issued by the defendant was in itself libelous as to them, and

2. That the press release, coupled with the attendant publicity, was such as to libel them as having committed a wrongdoing in public office.

The plaintiffs contend in publishing the libel the defendant was actuated by malice. The plaintiffs claim damages for injuries to their reputations, particularly in their professional or business capacities; for loss of earnings; and for pain and suffering of body and mind. Plaintiffs also claim punitive damages.

* * * * *

Defendant's Pretrial Statement

This is an action for libel growing out of a press release concerning plaintiffs, officials of the Office of Rent Stabilization,

issued by defendant as Acting Director of Rent Stabilization on February 5, 1953. Defendant denies liability for the following reasons:

1. He was clothed with absolute immunity by virtue of the fact that the press release was issued by him in connection with his official duties as Acting Director of the Office of Rent Stabilization.

2. The occasion under which the press release was issued was qualified privileged in that defendant was under a legal and/or moral duty to speak and he issued the press release without malice toward plaintiffs.

3. The statements contained in the press release regarding plaintiffs were true.

4. The statements contained in the press release were in the realm of fair comment.

5. The statements contained in the press release were not libelous since they imputed no illegal action or professional incompetence to plaintiffs but merely disapproval of plaintiffs' acts.

Finally, defendant takes the position that plaintiffs have suffered no damage by virtue of the statements concerning them in the press release complained of.

Amended Answer

(Filed November 10, 1955)

Pursuant to leave granted at pretrial of this action, defendant's answer to the complaint is hereby amended in the following particulars:

SIXTH DEFENSE

3. Denied. Defendant, William G. Barr, was at the time of the issuance of the press release and at all times material to the allegations of the complaint, Acting Director of the Office of Rent Stabilization.

9. The teletype referred to in paragraph 9 of the complaint was sent by the national public information officers of the Office of Rent Stabilization to the regional public information

officers of said agency as a necessary step in coordinating the information services of the Washington and Field Offices and constituted a normal and usual step in official duties of the agency.

SEVENTH DEFENSE

At all times material herein defendant was Acting Director of the Office of Rent Stabilization. The press release referred to in the complaint was made by defendant in furtherance of his official duties, was within the scope of his authority, and defendant is therefore immune from civil liability therefor.

* * * * *

Statement of Testimony

(Filed April 13, 1956)

On the 10th day of November 1955, this cause came on to be heard before the Honorable Alexander Holtzoff, Judge of the District Court for the District of Columbia. The plaintiffs appeared by Byron N. Scott and Richard A. Mehler, as counsel, and the defendant appeared by Robert L. Toomey, Edward O. Fennell and Irvin M. Gottlieb, as counsel. After all parties announced that they were ready for trial, a jury was empanelled and sworn to try the cause, when, among others, the following proceedings were had:

Mr. Scott made an opening statement on behalf of plaintiffs (15–20).[1] Mr. Fennell then made an opening statement in behalf of the defendant (20–29).

Plaintiffs, to sustain the issues in their behalf, offered as evidence in chief the February 5, 1953, press release and the February 6, 1953, teletype issued by defendant, and they were stipulated to by defendant's counsel (33, 36), and they were read into the record (Plaintiffs' Exhibit 1 and 2) (34–38). Pursuant to instructions from the court (30–33), plaintiffs rested after having reserved the balance of their case.

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[1] Parenthetical numerical references are to the pages in the transcript.

William G. Barr, the defendant was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct examination by Mr. FENNELL:

In 1950, I was employed by the Office of the Housing Expediter in Washington, D. C., as General Manager, which was in effect the second person in charge (39). Plaintiff John Madigan was Deputy Housing Expediter in charge of administration, *i. e.*, personnel, budget and fiscal matters (39–40) and the plaintiff Linda A. Matteo was in charge of personnel (40).

Defendant's Exhibit 1, a memorandum dated May 29, 1950, stiuplated to as having been prepared and signed by Madigan (45) and sent by him to G. W. Comfort and L. A. Matteo, was read into the record (41–44).

Defendant's Exhibit 2, a memorandum, dated May 31, 1950, from Madigan to Tighe Woods, Housing Expediter, was then read to the jury.

Plaintiff's counse then agreed to stipulate that a condition existed in OHE making it necessary to do something to conserve money; that Madigan proposed to a regular staff meeting a method for handling it; that Barr wrote a memorandum to Woods which opposed it; and that Madigan had then written to Barr his comments on Barr's opposition (50–52). Defendant, pursuant to the stipulation, then offered in evidence (53): Exhibit 3, a memorandum, dated June 1, 1950, from Madigan to Messrs. Barr, Diggle, Dupree, McCarthy, and O'Brien; Exhibit 4, which was a memorandum, dated June 1, 1950, from Barr to Woods, entitled "Summary of Staff Meeting June 1, 1950"; and Exhibit 5, which was the June 2, 1950 memorandum to Barr from Madigan.

After a discussion between the Court and Mr. Fennell (54–58), Barr continued his direct examination.

I was present at a staff conference on June 1, 1950 at which Madigan's plan was presented to the staff (58–59). The plan was presented to Tighe Woods who overruled it shortly after the staff meeting (59). I later learned that 53 employees out of 2,500 took advantage of the plan (59) including Mrs. Matteo and Mr. Madigan (60). They "terminated themselves one

day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued employment as temporary employees, with the intent to convert back to permanent employees at a later date" (60–61). Plaintiffs along with others of the 53 reverted back to permanent employee status (61). At the time the press release was issued in February 1953, "I was Acting Director [of Rent Stabilization] in the sense that the Director was out of town and the regulations provided that the Deputy Director, which was my position, would become Acting Director in that type of case" (63).

Cross-examination by Mr. SCOTT:

I was Deputy Director on February 5, 1953, and with the Director out of town I could act as Director. I would become Acting Director on February 9, 1953, as stated in the press release, because the permanent Director was resigning and I was being appointed Acting Director. I thought the powers in either sense were the same (64). I was firm in my convictions against Madigan's plan because I thought it improper (64–65). I would not have given approval to any plan that would have in any way violated the spirit of the law (66).

Counsel stipulated as to the provisions of the Thomas Amendment (68).

Plaintiffs introduced into evidence Exhibits 3, 4, 5 and 6, personnel forms carrying into effect for John J. O'Brien, Deputy Director for Information (72) the same personnel actions described under the Madigan plan (68–75).

Redirect examination by Mr. FENNELL:

I thought the plan improper because it violated the spirit and intent of the Thomas Amendment (75). I asked the General Accounting Office for an opinion as to the legality and on ruling it illegal the employees were required to pay the funds back (76). The plan proposed by Madigan at the staff conference contemplated that employees would be terminated as permanent employees, collect their accumulated annual leave in a lump-sum payment, be reappointed the next day as

temporary employees, stay on as temporary employees for a month or two or three and be reconverted to permanent employees all while holding the same positions (96). I felt this violated the spirit of the Thomas Amendment (96) and illustrated the point on the blackboard (97–101). On January 28, 1953, I was acting head of the agency because the head was out of town (103). A letter, dated February 3, 1953, to Senator Williams over my signature (Defendant's Exhibit 7) was prepared by Mr. Madigan (106–107) and I first learned of it when I saw a copy of it on my desk (107). On learning of the letter, I told Madigan that in my opinion the letter defended the 1950 plan and asked why it had been sent without my knowledge (108). Madigan explained that Senator Williams had inquired and was in a hurry for the reply and that my secretary, or someone else in the office, signed the letter; I told Madigan that I should have been contacted because I would not have defended the plan (108). Senator Williams made a speech on the Senate floor the following day (109). Newspapers and other interested parties contacted me about Plan X between Feburay 3 and 5 (109–110). On February 5, I spoke to Mrs. Matteo and Mr. Madigan in my office before the issuance of the press release (110). I stated to them that the plan had been made public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency and myself I had to take disciplinary action against an act which I deemed improper (110–111). In response to the court's question that I "propose to suspend them for something they did in 1950," I said "Yes, sir." (111). "And certainly no action would have been taken in 1953 if this matter had not become a public issue" (111).

In an exchange between the Court and counsel the following was developed: the suspensions were somewhat delayed; although a board after a hearing recommended revocation of the suspensions, Dr. Flemming, head of Economic Stabilization Agency, reversed the board and upheld the suspensions (116–118).

Charles P. Liff was called as witness and he testified as to matters not material to the appeal in this case (119–122).

The defense rested (122).

At the request of Mr. Scott, the Court took judicial notice of the fact that the Thomas Amendment, *i. e.*, Section 1212 of the General Appropriation Act of 1951, was approved on September 6, 1950 (122–123).

Linda A. Matteo, one of the plaintiffs was called as a witness and being first duly sworn testified as follows:

Direct examination by Mr. SCOTT:

In 1950, I was director of personnel for the Office of the Housing Expediter which later became the Office of Rent Stabilization (128). As such, I was responsible for all the technical aspects of a personnel program, which included recruiting, placement, disciplinary action, classification and I also was responsible for advising the deputy for administration on any procedures or policy matters, consulting with him on any suggested changes in those matters (128–129). I remember receiving Mr. Madigan's memorandum of May 26 (Defendant's Exhibit 1) (130). The purport of it was that the agency was faced with a difficult financial situation and Mr. Madigan was trying to find ways and means of conserving funds for the agency, for future operational problems, as well as immediate needs (130). The memorandum had outlined a plan for using an appropriation for terminal leave to relieve some of the heavy obligation of the agency in terminal leave (131). The memorandum asked my advice on this procedure (131). The agency was already on reduction-in-force notices and Mr. Madigan's proposal provided that those with maximum leave or who would not be hurt by it would be terminated under the reduction-in-force notices and given limited temporary appointments on the day following the reduction-in-force terminations which they would live out until they were either dropped from the agency, or transferred or whatever their future might hold (132–133). Thirty-days notice must be given before firing a permanent employee but there is no such requirement for firing a temporary employee (133). I knew of precedents for the use of such a procedure (134).

The court at Mr. Scott's request then took judicial notice of two Comptroller General's decisions, *i. e.*, 26 C. G. 259 and 27 C. G. 41 (134–136).

The plan had advantages and disadvantages to the agency and the employees (137–139). I did not attend the staff conference on June 1; I was advised that Mr. Woods, Director of OHE, said that the plan was too complicated to explain to the field offices and would not be adopted generally (140–141). The subject of the plan came up later when Miss Bucher, my chief of placement, came to me with a list of some 20 names of persons who wanted to volunteer for the plan if adopted (141). I asked Mr. Woods about it and after some discussion he gave permission for use of the plan in some 50-odd cases who volunteered for it (141–142, 144). I did not talk with Mr. Madigan before my discussion with Mr. Woods, but I told Mr. Madigan of the outcome (142). Mr. Barr ordered the O'Brien personnel action in December 1950 (144–147). On February 5, 1953, I was Director of Personnel for the Office of Rent Stabilization at a $10,000 a year salary (147). On that day, Mr. Barr sent for me and I had a talk with him in his office; Mr. Madigan also was present (147). Barr told us that he had talked to a lot of people, to Tighe Woods, ESA, Albert Thomas, and that he had to do something about this; that he wanted to keep his job, and in order to protect himself he was going to suspend us on the 9th and he handed each of us a letter (147–148). I received a letter of suspension on the 9th but it was later withdrawn (148). On the 12th I received a letter of intention to suspend on the 24th (148–149).

Cross-examination by Mr. FENNELL:

I sent Madigan a memorandum in response to his memorandum of May 26 (150) and he incorporated it into his 7-page memorandum (152). I took advantage of the plan (155). OHE was due to expire on June 30, 1950, and the plan was proposed before new legislation extending the life of the agency was enacted and the plan as to 49 volunteers went into effect on June 25 and on June 23 Congress had extended the life of OHE and no appropriation was passed until September, as I recall it (163–164). I and the other participants in the plan were required to pay the money back (165).

John J. Madigan, one of the plaintiffs being duly sworn testified as follows:

Direct examination by Mr. Scott:

In 1950, I was employed by the Office of Housing Expediter in the national office in Washington, D. C., as Deputy Housing Expediter for Administration (168). There were other deputies and special assistants (168). I had the Administrative Division with three branches: Administrative Services headed by William H. Weed; Budget, Planning and Finance headed by William G. Comfort; and Personnel headed by Mrs. Matteo (169). In 1950, my duties were the general supervision of these branches performing the housekeeping functions and I was responsible to the Director for plans or means for conserving funds (170). Mr. Barr and Tighe Woods were my immediate superiors (170). On May 26, I sent a memorandum to Mrs. Matteo and Mr. Comfort about the proposed procedure (Defendant's Exhibit 1) (171). The memorandum was sent to get reactions of interested people which was usual practice (171). Mrs. Matteo commented in writing and Comfort discussed it with me (171). Both Mrs. Matteo and Mr. Comfort volunteered under the procedure (171). Comfort was not suspended (172). I knew of the Comptroller General's decisions (172). I attended a staff conference in Mr. Barr's office on June 1 and the plan was fully discussed (172). Present were the eight heads of divisions and special assistants (see page 168) but Mr. Woods was out of the city (173). The following day a special meeting was called to reconsider the matters discussed on June 1, and Woods then indicated that the plan was too complicated to explain to the field and therefore it would not be adopted generally (173–174). Barr was present at the meeting (174). I next heard about the matter some time later when Mrs. Matteo reported that she had talked to Mr. Woods about some application of it (174). The plan was authorized for the 49 employees after Mrs. Matteo's conversation with Mr. Woods (175). I volunteered for the plan (175). On January 28, 1953, I was Deputy Director of Rent Stabilization (Administration) and on January 30 I received a letter addressed to ORS from Senator Williams (175). This occurred on Friday

January 30 in the afternoon (175) and Mr. McCarthy of the Congressional liaison unit handed it to me (176). I immediately read the letter and as I was concluding it, the Director of Rent Stabilization, Mr. Henderson, dropped in for a chat and we discussed the letter (176). The writer of the letter was confused since the letter referred to mass resignations in 1951 and I suggested to Mr. Henderson, who was not in the agency in 1950, that a letter be sent to Senator Williams about the 1950 situation (176). Mr. Henderson agreed (176). The first thing on the following Monday morning I prepared a preliminary rough draft of an answer to Senator Williams and referred copies to others for views and after getting some drafts back with comments, the Personnel Division was asked to compile from records certain information asked for by Senator Williams (177). Senator Williams telephoned at 9:30 a. m. and asked about the letter, and I told him it was being given undivided attention (177), and he called again about two hours later and asked if the letter could be picked up on the following day, *i. e.*, Tuesday, February 3. In preparation of the final draft, I did not attempt to see Mr. Barr about it but I tried to get the approval of various interested officials (178). My secretary then took the final letter for Mr. Barr's signature and she was advised that he was at a conference at Economic Stabilization Agency and was not expected back until after noon time and Frances Gordon, Mr. Henderson's secretary, volunteered to sign it in Barr's name as Acting Director (179). As soon as it was signed, I sent the file with a note to Mr. Barr's office (179). I talked to Barr about it on the same day; and Barr did not criticize me for having sent it out or for having had it signed by his secretary (180). Another letter was sent to Senator Williams on the next day which I prepared for Barr's signature (181). I talked to Barr on February 5 (181) in his office with Mrs. Matteo present after Barr sent for us (182). Barr said that he had talked to a lot of people—Tighe Woods, officials at Economic Stabilization Agency and Albert Thomas, congressman from Texas (182). Barr told us that he was suspending the two of us after indicating that he wanted to protect himself (183).

Cross-examination by Mr. FENNELL:

Mr. Barr had always been against the plan (183–184). When the letter to Senator Williams was prepared, I knew that Barr was Acting Director and that Mr. Henderson had submitted his resignation (184). A draft of the letter was not sent to Mr. Barr because it was not customary to send those things around to everybody at every stage (185). At the Friday January 30 conversation, Mr. Henderson did not give instructions to prepare the reply to Senator Williams because that was one of my functions and he merely agreed to reply as I had suggested (186). In 1950, Mr. Woods said the plan seemed complicated, there was not enough time to inform the personnel, and it would not be adopted generally (187). This decision was made at the special staff meeting (187). On June 23, 1950, the life of the agency was extended for a year with certain qualifications (187–188). The plan went into effect for 49 persons on June 25, 1950 (188). My plan was predicated on the fact that the agency was headed towards liquidation (191). The object of the plan was to use up $2,600,000 earmarked for terminal leave (196).

John J. O'Brien and Burnham W. Diggle were called as witnesses in succession, and both testified to matters not at issue on the appeal (201–219).

William G. Barr, the defendant, on being called as a witness by counsel for plaintiffs, having previously been sworn, testified as follows:

Direct examination by Mr. SCOTT:

I recommended to Mr. Woods that the position of Deputy Director for Administration be abolished (223). My memorandum so recommending was dated May 26, 1950 (223). At the February 5, 1953 conference with Mrs. Matteo and Mr. Madigan, I told them that I intended to suspend them on the 9th (225). Before the conference, the matter had been discussed with members of my staff, Congressman Thomas, and several other people and I took the action as head of the agency (226). The latter had also been discussed with Ross Scherer, Acting Director of ESA, the parent agency of ORS on February 4 (228).

Mr. Toomey on behalf of defendant referred the Court to a Joint Resolution approved on June 29, 1950 (64 Stat. 302), which made applicable to the Office of the Housing Expediter the provisions of the General Appropriation Act, 1951, as passed by the House of Representatives on May 10, 1950, and this included the Thomas Amendment (232–235).

I discussed the matter with Ross Scherer, acting head of ESA (240–242). I decided to take disciplinary action because of the criticism that was being presented against the agency (242). In my opinion the letter to Senator Williams defended the plan and that it was not my position in the matter (243). I acknowledge that during the course of the administrative hearing with respect to the suspensions I said that Mr. Scherer had called me about the matter and I told him that I was contemplating disciplinary action because I felt there was no defense for the plan and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge (245–249).

Cross-examination by Mr. FENNELL:

In 1950 I had a staff member Ben Yoshioka survey the agency with respect to the organization and on the basis of it made recommendations (250–252).

Exhibit 8 was introduced on behalf of the defendant to show that Mr. Barr was Acting Director in February 1953 (252–254); these included the following: a June 4, 1952, memorandum from Tighe Woods to all ORS employees appointing Barr as Deputy Director of Rent Stabilization; a January 31, 1953, letter from Economic Stabilization Director Michael V. DiSalle appointing Barr as Acting Director of ORS effective at the opening of business on February 9, 1953; a February 2, 1953, memorandum designating Barr as Acting Director on February 2 through 6 during the absence of the Director Henderson; General Order 9, as amended, setting forth the organization of ORS; and the job description of the Deputy Director of Rent Stabilization.

Defendant moved for a Directed Verdict on the basis of (1) truth, (2) there was no defamatory imputation in the press

release, (3) there was a qualifiedly privileged occasion so that the plaintiffs had to prove malice (254–255). The Motion for Directed Verdict was denied (255). The Court also denied the Motion for a Directed Verdict on the grounds of absolute privilege (260–261).

Linda A. Matteo, recalled as a witness by counsel for plaintiffs and having been previously sworn, testified as follows:

Cross-examination by Mr. FENNELL:

I was reinstated in my position on April 28 (267–268). I was reduced in force on April 30 when ORS was about to expire (268–270).

John J. Madigan recalled as a witness by counsel for plaintiffs and having been previously sworn testified as follows:

Direct examination by Mr. SCOTT:

On February 5, 1953, my salary was $11,800 (275). I retired at $6,240 per year after working for the Government for 42 years (276–277).

Cross-examination by Mr. FENNELL:

The suspension stood when the Economic Stabilization Administrator did not accept the board's recommendation that it be revoked (282). I elected to retire rather than go back to ORS (286).

Called as character witnesses were Sophie Donine, William Weed, John T. McCarthy and Florence Ada Bloomberg (289–314).

William G. Barr testified as to his net worth (323–325).

Both sides rested (325–380).

The jury was charged (383–401).

This statement has been prepared and is being filed in accordance with the provisions of Rule 75 (c) of the Federal Rules of Civil Procedure for inclusion in the record on appeal of this action to the United States Court of Appeals to the District of Columbia Circuit.

ECONOMIC STABILIZATION AGENCY,
Washington 25, D. C., January 31, 1953.

HON. WILLIAM G. BARR,
Deputy Director,
Office of Rent Stabilization, Washington, D. C.

DEAR MR. BARR: You are hereby appointed as Acting Director of the Office of Rent Stabilization effective at the opening of business on Monday, February 9, 1953.

This appointment has been discussed with Mr. Ross Shearer who will become Acting Administrator of the Economic Stabilization Agency at the close of business on January 31, and he approves of this designation.

Thank you for your past efforts and sincere best wishes for your success.

Sincerely yours,

MICHAEL V. DISALLE.

ORS OFFICE NEWS,
February 2, 1953.

No. 6.

During the absence of James McI. Henderson, Director of Rent Stabilization, from February 2 through February 6, *William G. Barr, Deputy Director,* will be Acting Director of Rent Stabilization, and all correspondence usually prepared for Mr. Henderson's signature should be prepared for Mr. Barr's signature.

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No. 409

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM G. BARR, PETITIONER

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

WILLIAM G. BARR, PETITIONER

vs.

LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of William G. Barr, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on May 2, 1957.[1]

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the

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[1] Petitioner has been represented by the Department of Justice throughout this proceeding pursuant to 5 U. S. C. 309. See *Booth* v. *Fletcher*, 101 F. 2d 676 (C. A. D. C.), certiorari denied, 307 U. S. 628.

The cases were consolidated on appeal by order of the Court of Appeals of March 26, 1956, because of the identity of the factual and legal issues. A single petition is filed in accordance with Rule 23 (5) of the rules of this Court.

Court of Appeals, as modified by its order of June 6, 1957 (App., *infra*, pp. 16–24, 26–27), is reported at 244 F. 2d 767.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1957 (App., *infra*, p. 25). A timely petititon for rehearing *in banc* was denied on June 6, 1957 (App., *infra*, p. 28). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision.

STATEMENT

This is a libel suit instituted by respondents, former employees of the Office of Rent Stabilization, against petitioner, who was the Acting Director of that Office, based on matters contained in an official press release issued by the latter on February 5, 1953. The press release related to a then current congressional inquiry concerning a terminal leave plan which had been devised by the respondents in 1950 for employees of the agency. The facts of the case may be summarized as follows:

1. *The terminal leave plan.* In May, 1950, reduction-in-force notices were issued to personnel of the Office of Housing Expediter, an independent exec-

utive agency and the predecessor of the Office of Rent Stabilization, since the agency's statutory existence was about to expire. Respondent Madigan, who was Deputy Director in charge of personnel and fiscal matters, and respondent Mattco, chief of the personnel branch, devised a plan which was designed to utilize $2,600,000, which had been earmarked in the agency's appropriation for the fiscal year 1950 exclusively for terminal leave payments, as a means of conserving funds for future operational needs should the agency's life be extended (R. 14, 17). The purpose of the plan was to avoid a large terminal leave carry-over into the next fiscal year which would have to have been paid out of the agency's general funds. Under the plan, employees of the agency would be terminated pursuant to the existing reduction-in-force notices, receive payment for accrued annual leave out of the terminal leave appropriations, be rehired the following day as temporary employees, and be restored to permanent status if the life of the agency were extended (R. 14–15, 17).

Petitioner, who was then General Manager of the Office of Housing Expediter, was opposed to the plan on the ground that it violated the spirit of the so-called Thomas Amendment to the General Appropriation Act, 1951, 64 Stat. 768, which required government employees to use their annual leave within a specified time and prohibited payments for unused annual leave accumulated during the calendar year 1950 (R. 15). The Housing Expediter decided against general adoption of the plan, but, when Mrs. Matteo advised him that some of the employees de-

sired to volunteer for it, he gave permission for the plan to be utilized by any such volunteers (R. 18, 19). On June 23, 1950, Congress extended the authority of the Office of Housing Expediter to June 30, 1951, and two days later the terminal leave plan was put into effect for forty-nine employees of the agency, including the respondents (R. 14, 18, 21).

2. *The press release.* On January 28, 1953, Senator John J. Williams of Delaware wrote to the Office of Rent Stabilization (successor to the Office of Housing Expediter) inquiring as to the 1950 terminal leave payments (R. 19–20). The letter came to the attention of respondent Madigan, who prepared a preliminary draft of a reply to Senator Williams defending the plan (R. 20). The draft was not brought to the attention of petitioner, who was at that time the Acting Director of the agency (R. 16, 20). The letter was prepared in final form and sent to petitioner's office for his signature, but in his absence his name was signed by the Director's secretary and the letter was delivered to Senator Williams on the morning of February 3 (*ibid.*).

The following day, Senator Williams on the floor of the Senate delivered a speech criticizing the 1950 terminal leave payments and requesting that the matter be investigated by a congressional committee (R. 3, 16). Senators Ferguson, Dirksen, and McCarthy joined in the denunciation of the leave payments as a "conspiracy to defraud the Government" and a "raid on the Treasury." 99 Cong. Rec. 868–71. These comments received wide publicity. See, *e. g.*, *The New York Times*, February 5, 1953, p. 18, col. 8.

On February 5, petitioner advised the respondents that because of the criticism of himself and the Office of Rent Stabilization, the adverse publicity, and the need to protect himself and safeguard the interests of the agency, he was going to take disciplinary action against them (R. 16, 20, 22). He thereupon served them with letters expressing his intention to suspend them on February 9, the date when his appointment as Acting Director became effective.[2] Contemporaneously, at petitioner's direction, the Office of Rent Stabilization issued the following press release which is the subject matter of this litigation:

> William G. Barr, Acting Director of Rent Stabilization, today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.
>
> Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953 and the suspension of these employees will be his first act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.
>
> "In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

[2] Petitioner had been appointed Acting Director effective February 9, 1953, when the resignation of Director James Henderson was to become effective. When the press release was issued, petitioner was Acting Director by designation of Mr. Henderson who was then absent from Washington (R. 24).

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I sepecifically notified the employees under my supervision that if they applied for uch cash settlements I would demand thei" resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House SubCommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

3. *The proceedings below.* Shortly after the issuance of the press release, this suit was brought, charging that the release was a malicious libel causing damage to respondents (R. 1–6). Petitioner's motion to dismiss the complaint on the ground of absolute privilege was overruled by the District Court on the authority of *Colpoys* v. *Gates*, 118 F. 2d 16 (C. A. D. C.) (R. 7). Petitioner then filed an answer (R. 8–9, 12–13), and a jury trial was held. After re-

spondents had submitted evidence in support of their claim of liability, petitioner moved for a directed verdict on the grounds of (1) truth, (2) no defamatory imputation, and (3) qualified privilege. This motion was denied. The court also denied a motion for directed verdict on the ground of absolute privilege. A jury verdict was returned in favor of respondents in the amounts of $6,500 and $2,000, respectively.

On appeal to the Court of Appeals for the District of Columbia Circuit, the sole issue raised by petitioner was whether the issuance of the press release was absolutely privileged (App., *infra*, pp. 18–20). Since any of the other possible grounds of appeal, if successful, would have resulted, not in an outright judgment for petitioner, but in a new trial, petitioner requested the Department of Justice to limit the appeal in this way so as to avoid the risk of a damage award larger than the one rendered and also to avoid the burden and effort of a second protracted trial.[3] At the request of the Court of Appeals, each party filed a memorandum on the question of whether the court could nevertheless consider the issue of qualified privilege. Upon reconsideration, petitioner advised the Department of his desire to have this question dealt with, and, accordingly, it was urged upon the Court of Appeals that it could properly consider

[3] The Government had no objection to this course of action since its effort over many years has been to have the defense of absolute immunity sustained, thereby barring the inception of defamation actions against government officials and avoiding the inevitable dangers and harassment of a lengthy trial.

the question under its Rule 17 (i), which provides that "the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." The court concluded, however, that since the waiver was "informed and deliberate," the rule invoked on petitioner's behalf was not applicable and the decision would be confined to the issue of absolute privilege (App., *infra*, pp. 19–20).

On the merits, the court (Judge Danaher dissenting) affirmed the judgment against petitioner. The majority opinion (by Chief Judge Edgerton, with Judge Fahy concurring) recognized that petitioner's decision to suspend respondents "probably [was] within his general line of duty," but held that petitioner "in explaining his decision to the general public * * * went entirely outside his line of duty" (App., *infra*, pp. 17–18). The majority stated that "if the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged" (App., *infra*, p. 18), but that in this respect the Acting Director of the Office of Rent Stabilization was not different from the United States Marshal involved in *Colpoys* v. *Gates*, 118 F. 2d 16 (C. A. D. C.). The majority subsequently modified their opinion to declare that the principle of absolute privilege was not necessarily limited to Cabinet officers but might include other officers who held comparable positions. (App., *infra*, pp. 26–27).

Judge Danaher, in dissenting (App., *infra*, pp. 20–24), stressed the fact that, as Acting Director of the Office of Rent Stabilization, petitioner had delegated to him all of the powers, duties, and functions

conferred on the President by Title II of the Housing and Rent Act of 1947, 61 Stat. 193. In Judge Danaher's view, the press release was no more than a declaration of policy by a policy-making executive with respect to a matter committed by law to his control or supervision.

REASONS FOR GRANTING THE WRIT

The holding in this case—that the issuance of an official press release by the head of an independent executive agency is not absolutely privileged—constitutes a departure from the consistent pattern of decisions of various courts of appeals according immunity to acts of government officers within the scope of their official authority. It conflicts with the principles of the ruling of this Court in *Spalding* v. *Vilas*, 161 U. S. 483, from which this pattern of lower court cases has developed. And its effect will be to hamper seriously the ability of policy-making officials below cabinet rank to engage in public discussion of the affairs of government although, given the present complexity of governmental operations, these officials must of necessity constitute the major source of information concerning public affairs. In addition, the opinion of the Court of Appeals, as amended, leaves the law in a state of uncertainty in an area which has become increasingly important and has not received the attention of this Court since its decision in *Spalding* v. *Vilas*, *supra*. For these reasons, we believe that the decision below merits further review.

1. In *Spalding* v. *Vilas*, this Court held that the head of an executive department was immune from

liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U. S. at 498. The immunity was absolute so that, as long as making the statement was not unauthorized by law or beyond the scope of official duties, motive was immaterial. And in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed. 161 U. S. at 498–99.

The principles of that decision were followed by the Court of Appeals for the District of Columbia Circuit with respect to official communications later publicized, *Mellon* v. *Brewer,* 18 F. 2d 168, certiorari denied, 275 U. S. 530, and with respect to press releases issued by department heads, *Glass* v. *Ickes,* 117 F. 2d 273, certiorari denied, 311 U. S. 718. But in *Colpoys* v. *Gates,* 118 F. 2d 16, that court held that a United States Marshal was outside his "general line of duty," and hence not privileged, in issuing a statement to the press with respect to the discharge of two of his deputies for alleged malfeasance. Since the Marshal was not a policy-making official, no public interest required that his public discussion of the matter be protected in this way. The court expressly left open the question, which it answered here, of whether the privilege of public discussion would extend to officers below cabinet rank who determine the policies to be pursued by the Government.

In nondefamation cases, and in defamation cases involving official communications between government

officials, the Court of Appeals did extend the cloak of immunity to relatively minor officials below the department head level. *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643; *Farr* v. *Valentine*, 38 App. D. C. 413; *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616.[4] The court recognized that it is through these officials, under appropriate delegations of authority, that the business of government is carried on and that "[i]t is, therefore, not the particular position of the party making the report or communication that entitles it to absolute privilege so much as the occasion of making it, and the reasons of public policy for the immunity." *De Arnaud* v. *Ainsworth*, *supra* at 181.

It has also been recognized that, if the purpose of the rule of immunity is to be effectuated properly, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such delicate questions of fact as proper motivation and reasonableness of conduct. *Gregoire* v. *Biddle*, 177 F. 2d 579, 581, (C. A. 2), certiorari denied, 339 U. S. 949; *Cooper* v. *O'Connor*, *supra* at 140. "* * * [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most ir-

[4] See also *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C. A. 6); *Love* v. *Snyder*, 184 F. 2d 841 (C. A. 6); *United States* v. *Brunswick*, 69 F. 2d 383 (C. A. D. C.); *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R. I.); *Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N. D. Ill.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W. D. Ky.); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.).

responsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle, supra* at 581.[5]

2. In the instant case, the Court of Appeals has refused to apply these principles to statements to the press by high policy-making officials below cabinet or comparable rank. We submit that there is no rational basis for so limiting the applicability of the immunity rule. While the correctness of the decision in *Colpoys* v. *Gates* and the standard there applied is by no means free from doubt, the difference between the position of United States Marshal and the Director of the Office of Rent Stabilization is apparent, and, as pointed out by Judge Danaher, the *Colpoys* case should not have been controlling here. Petitioner was the head of a constituent agency of the Economic Stabilization Administration and was operating pursuant to a very broad delegation of presidential authority. His agency supervised and enforced federal

[5] The effectiveness of the immunity is all but destroyed if the official has to subject himself to a trial, even though its outcome may be favorable to him. The purpose of the rule of absolute immunity is to cut off litigation entirely, or at the least to end it at its inception without the necessity of a trial going into the official's motives, reasons, and justification. It is precisely for this reason, as pointed out in the Statement, *supra*, pp. 7–8, that petitioner's appeal was limited to the defense of absolute immunity; all the other defenses available to him would have resulted merely in a new trial, with its burdens and the possibility of increased awards by a new jury. Similarly, from the Government's viewpoint, the rule of absolute immunity is the only satisfactory solution. Qualified privilege always allows the plaintiff to seek to prove—through a trial and examination of witnesses—that the defendant acted through malice or other improper motive; rather than avoiding a full trial, the defense of qualified privilege invites one.

rent control. All powers, duties, and functions conferred on the President by Title II of the Housing and Rent Act of 1947 were delegated to the Director of the Office of Rent Stabilization by the Economic Stabilization Administrator, and "[t]he aforementioned delegation of authority [reflected] the Administrator's policy to delegate to constituent agencies operating authority to the fullest practicable extent consistent with his ultimate responsibility for the conduct of the Agency's activities in a reasonable and efficient manner.". 16 Fed. Reg. 7630. Of course, petitioner had full responsibility for the internal management of the agency with its several thousand employees and, like all heads of executive departments and agencies, was answerable to the President and Congress in regard to the administration of the agency's policies. The issuance of press releases was a regular practice of the Office of Rent Stabilization. See Rourke, *Law Enforcement Through Publicity*, 24 U. Chic. L. R. 225, 233 (1957). The circumstances which prompted the issuance of the press release, as outlined *supra*, at pp. 4–5, make it clear that petitioner was within the general scope of his official authority in giving full publicity to the entire affair. Petitioner's situation was no different, in any respect, from that of the heads of similar agencies or other comparable officers. There can thus be no doubt that the decision of the court below rests entirely on the undisputed fact that petitioner was not a Cabinet member and did not hold a position like that of a Cabinet officer; the square ruling is that all such officials are unprotected by the rule of absolute immunity.

But the rationale of the rule of immunity applies with equal force to lesser officials who hold policy-making or "political" positions. They, too, should be free to explain their acts and policies to the public without fear of defamation charges resulting from their public statements. Vigorous performance of duties untrammeled by the fear of retaliation by private damage actions necessitates the existence of the privilege. Public explanation of his actions should be considered as much a part of petitioner's duties as the taking of the action itself. The situation in the instant case was very similar to that in *Mellon* v. *Brewer, supra,* where a press release by the Secretary of the Treasury, designed to offset adverse publicity to his department and the impairment of public confidence, was held to be absolutely privileged. Whether or not the author of the defamation is a cabinet officer should not be controlling, for the policy of free disclosure and discussion of facts by public officials is equally present and has long been followed by high officials who do not hold cabinet rank.

The interest of the public, which is the recipient of the communication, is disregarded by the decision of the Court of Appeals. Press releases and press conferences have, of course, become an important and accepted phase of governmental operations. The result of the decision, if allowed to stand, will probably be a sharp restriction on an important source of information for the press (see editorial, The Washington Post, June 10, 1957, p. A12, col. 1.) and, in turn, a curtailment of information which the public is en-

titled to and should receive about controversial matters. For there can be little doubt that the decision below by the court whose rulings govern at the seat of government—with its outright denial of absolute privilege to all officials below cabinet status and its express reservation of decision even as to "officers whose positions are comparable to those of Cabinet officers" (App., *infra*, pp. 26–27)—will have a wide application and a broad effect.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
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Attorneys.

SEPTEMBER 1957.

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APPENDIX

In the United States Court of Appeals for the District of Columbia Circuit

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided May 2, 1957

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch,* United States Attorney, and *Joseph Langbart,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

EDGERTON, *Chief Judge*: In 1953 the defendant Barr was Acting Director of the Office of Rent Stabi-

lization, a branch of the Economic Stabilization Agency. The head of the Agency was the Director of Economic Stabilization. The plaintiffs Madigan and Matteo were employees in the Office of which the defendant was Acting Director. A terminal-leave plan which the plaintiffs had sponsored in 1950 was under criticism in Congress in 1953. The defendant had disapproved of the plan. Without his knowledge, his secretary signed the defendant's name to a letter to a Senator defending the plan. The plaintiff Madigan had drafted the letter. When the defendant learned that the letter had gone out over his signature, he issued a press release in which he said his first act of duty would be to suspend the plaintiffs, the officials responsible for the terminal-leave plan, and that although he "was advised" the plan was legal, he thought it "violated the spirit of the Thomas Amendment" and he "violently opposed it".

The plaintiffs sued the defendant for libel. The verdict and judgment were for the plaintiffs. The defendant appeals on the ground that he had an "absolute immunity or privilege" in publishing the press release.

We agree with the District Court in overruling that contention. The defendant's decision to suspend the plaintiffs for what he thought, mistakenly or not, was sufficient cause, and his execution of any documents appropriate to that end, were probably within his general line of duty. If so, a letter to his official superiors explaining his decision would also have been within his general line of duty. *Cf. Farr* v. *Valentine*, 38 App. D. C. 413. So would an explanation addressed to the plaintiffs or to their representative. *Newbury* v. *Love*, —— U. S. App. D. C. ——, —— F. 2d —— (Feb. 28, 1957). But in explaining his decision to the general public, the defendant went

entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected. If the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged. "It has been held that a Cabinet officer is absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision'." But this is because "Cabinet officers have political functions, and public interest is thought to require that they be not restrained by fear of libel suits from publicly explaining their acts and policies." *Colpoys* v. *Gates*, 73 App. D. C. 193, 194, 118 F. 2d 16, 17.* We held in that case that a United States Marshal was not absolutely privileged to defame his subordinates in publicly explaining his reasons for dismissing them. Neither, we think, was an Acting Director of the Office of Rent Stabilization.

In general, "When the author of a libel writes under the compulsion of a legal or moral duty, or for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins* v. *Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 84 U. S. App. D. C. 51, 54, 171 F. 2d 21, 24. In the District Court the defendant Barr claimed that if his press release was not absolutely privileged, it was qualifiedly privileged by reason of this principle. However, on this appeal he has waived this claim. His brief states the "Question Presented" as follows: "Whether the Acting Director of the Office of Rent Stabilization should be ac-

[*The opinion was later modified at this point. See pp. 26-27, *infra*.]

corded absolute immunity in a suit for libel for allegedly defamatory statements made by him in a press release, issued on Thursday, February 5, 1953, announcing his intention to suspend two named employees of the agency on Monday, February 9, 1953, and setting forth his reasons for taking that action." The entire "Statement of Points" in his brief is as follows: "The District Court erred in denying the defendant's respective motions to dismiss and for a directed verdict which were based on the defense of absolute immunity or privilege."

The waiver of the claim of qualified privilege was informed and deliberate. The appellant was represented by eminent counsel. An Assistant Attorney General of the United States, the United States Attorney for the District of Columbia, and two attorneys of the Department of Justice, all signed appellant's brief. All have now filed a memorandum which contains this summary of the matter: "Appellant's brief, in conformity with Rule 17 (c) (7), set forth in the Statement of Points only the contention that the District Court erred in denying appellant's respective motions based on the defense of absolute immunity or privilege. Similarly, the Question Presented posed only this question, and the brief discusses this case only in terms of the applicability of absolute immunity as a defense. Finally, counsel for appellant, on October 12, 1956, disclaimed in open court any intent to urge any error on the part of the District Court other than its failure to accord to appellant the defense of absolute immunity or privilege."

This court's Rule 17 (c) (7) requires that appellant's brief state "the points on which appellant intends to rely". Rule 17 (f) provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may

notice and pass upon a plain error not pointed out or relied upon." This exception for "plain error" protects our authority to deal, in the interest of justice, with a point counsel have overlooked. In the absence of extraordinary circumstances the exception should not be applied, in a civil case, to a point that eminent counsel, for strategic or other reasons, have deliberately chosen to waive. Accordingly we do not consider whether there was plain error in the District Court's rejection of the claim of qualified privilege.

Affirmed.

DANAHER, *Circuit Judge, dissenting:* Appellant was the duly appointed Acting Director of the Office of Rent Stabilization at the time of the alleged libel. "All powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, exclusive of section 208 (a), as amended, and delegated to the Economic Stabilization Administrator by Executive Order No. 10276, shall be exercised and performed by the Director of Rent Stabilization pursuant to Executive Order No. 10276 and except as otherwise provided by this order."[1]

The declaration of policy of such an executive, as contained in the challenged press release, seems to me to be absolutely privileged. The appellant, exercising by redelegation the President's own powers, was entitled to immunity.[2] The official act was within the scope of those powers. The occasion was such as jus-

[1] Sec. 4 of GO 9—Organization for Rent Stabilization, 16 FED. REG. 7630.

[2] *DeArnaud* v. *Ainsworth*, 24 App. D. C. 167, 178 (D. C. Cir. 1904); *Glass* v. *Ickes*, 73 App. D. C. 3, 117 F. 2d 273 (D. C. Cir. 1940), *cert denied*, 311 U. S. 718 (1941); *Mellon* v. *Brewer*, 57 App. D. C. 126, 18 F. 2d 168 (D. C. Cir. 1927), *cert. denied*, 275 U. S. 530 (1927); cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U. S. 949 (1950).

tified his action. The subject of the release dealt specifically with general matters committed by law to his control or supervision.

Appellee Madigan had been Deputy Housing Expediter in charge of personnel budget and fiscal matters within the agency. Appellee Matteo had been responsible for all technical aspects of the personnel program including recruiting and classification, and had been adviser to the deputy for administration on procedures or policy matters. Mr. Madigan devised a plan, in which both appellees joined, whereby they "terminated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued as temporary employees, with the intent to convert back to permanent employees at a later date." Appellant's intra-agency opposition to the plan was known.

Members of Congress publicly attacked the plan. Earlier criticism had been crystallized in the Thomas Amendment.[3] Appellant told appellees on February 5, 1953 "that the plan had become public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency and myself I had to take disciplinary action against an act which I deemed improper."

Appellee Madigan two days earlier had prepared a letter to Senator Williams defending the plan. He did not attempt to see appellant about it, but for-

[3] § 1212, General Appropriations Act, 1951, 64 STAT. 768, provided in part: "No part of the funds of, or available for expenditure by any corporation or agency included in this Act * * * shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951 * * *."

warded the letter purporting to bear appellant's signature despite appellant's known opposition to the plan. Both appellees "took advantage" of the plan to use up the ear-marked funds.

Appellant testified that he decided to take disciplinary action "because I felt there was no defense for the plan and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge."[4]

The defense of this case was conducted by the Department of Justice. In the District Court appellant's motion for directed verdict was based in part on the ground that "the press release was qualifiedly privileged." The suit in last analysis, I take it, may be viewed as one against the Government which undoubtedly through Congress will be asked to respond to the judgment. I doubt that Government attorneys possess the power to waive a defense which, if it had been asserted, might have prevailed here. Compare our opinion in No. 13245—*Newbury* v. *Love*, decided February 28, 1957, where we found absolute privilege, despite *Colpoys* v. *Gates*.[5]

I see no obstacle in the *Colpoys* case to the result which I believe is required here. The limited functions of a marshal in publishing a statement in connection with the resignation of two deputies are not to be confounded with a situation such as the instant case presents. Even in *Colpoys* we recognized that officers with policy-determining functions are in a different category, and privilege is shown to have been accorded to acts in the general line of duty.

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[4] Cf. *Dickens* v. *International Brotherhood, Etc.*, 84 U. S. App. D. C. 51, 171 F. 2d 21 (D. C. Cir. 1948).

[5] 73 App. D. C. 193, 118 F. 2d 16 (D. C. Cir. 1941).

To recapitulate: here the Acting Director's status and authority stemmed from the President himself. His Executive Order made this agency head, in his own division, a policymaker second only to the Economic Stabilization Director. Involved, as a matter of top interest, was a policy position with reference to a plan admittedly devised to "use up" $2,600,000 of public funds which had been earmarked for terminal leave. If the appellant thought the Madigan plan had been a perversion of an appropriation to ends beyond the intention of Congress in providing the funds, it was his duty to speak out. He was not alone in his appraisal of the untoward result. His press release did no more than seek to allay the serious challenge to the integrity of the agency and to attempt to restore a public confidence which the use of the plan had impaired. The subject matter was personal to him because his name had without authorization been affixed to an official letter which misrepresented his position. The whole congeries of occurrences, including the position the Acting Director intended to take with reference to the problem, became of vital concern to the public. Under such circumstances, the press release was entitled to the status of privilege.

We need not, indeed I do not seek to, relax the rule which regards a cabinet officer as "absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committeed by law to his control or supervision,'"* I think we should hold only that this officer, on the facts here disclosed,

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* *Colpoys* v. *Gates*, *supra* note 5, 73 App. D. C. at 194, 118 F. 2d at 17, citing *Spalding* v. *Vilas*, 161 U. S. 483, 498 (1896).

acting in the name of the President and exercising, by redelegation, powers conferred upon him by statute, and possessed of policy-making functions, is immune on account of a policy statement issued within the scope of his authority as to a matter committed by law to his control.

In this view, I think the judgment should be reversed.

In the United States Court of Appeals for the District of Columbia Circuit

April Term, 1957. *C. A. 3221–53*

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE.

April Term, 1957. *C. A. 3221–53*

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Before EDGERTON, *Chief Judge*, and FAHY and DANAHER, *Circuit Judges*

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said District Court appealed from in these cases be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party in these cases shall bear his own costs on these appeals.

Dated: May 2, 1957.

Per Chief Judge EDGERTON.

Separate dissenting opinion by Circuit Judge DANAHER.

In the United States Court of Appeals for the District of Columbia Circuit

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge,* and FAHY, in Chambers

ORDER

It is ORDERED by the Court that the opinion of this Court in the above cases be modified by striking the following words beginning on the fifteenth line of the third page:

"We held in that case"

and by inserting in lieu thereof the following words:

"We do not suggest that this principle is limited to Cabinet officers. We have no present occasion to consider whether it would apply, *e. g.,* to the Director of Economic Stabilization, who was appellant's official superior, or to the Chairman of the Atomic Energy Commission,

or to other officers whose positions are comparable to those of Cabinet officers. Appellant's position was not of that sort. We held in *Colpoys*"

Per Curiam.

Dated: June 6, 1957.

In the United States Court of Appeals for the District of Columbia Circuit

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge*, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers

ORDER

Upon consideration of appellant's petition for a rehearing in banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: June 6, 1957.

Circuit Judges WASHINGTON, BASTIAN, and BURGER did not participate in the foregoing order.

Circuit Judge MILLER would grant the petition.

U. S. GOVERNMENT PRINTING OFFICE 1957